When the matter was brought to the Commission's attention by Phillips-Kerr-McGee (J.A. 329), the Commission, in its Order of April 3, 1968 (Pet. App. 1a, J.A. 373), rejected petitioner's argument and ordered payment by it at the 18.5 cent per Mcf rate set by the Commission in 1965. Petitioner's petition for rehearing of that Order (J.A. 394) was denied by the Commission's Order of May 24, 1968 (Pet. App. 14a, J.A. 419), which repeated that petitioner was obligated to restrict itself to a margin of 1 cent per Mcf.

Petitioner still refused to comply with the Commission's Orders.[3] The matter was again brought to the Commission's attention (J.A. 423, 431), and the Commission then issued its Order of December 13, 1968. (Pet. App. 19a, J.A. 441).

In this Order the Commission again reviewed the history of this case (Pet. App. 19a-22a, J.A. 441-44), noted the Commission's prior rejection of petitioner's arguments but that petitioner continued to ignore the Commission's Orders requiring payment of 18.5 cents per Mcf to Phillips-Kerr-McGee even though no stay of these Orders had been sought by petitioner (Pet. App. 22a-23a, J.A. 444-45), entered the formal finding that "The Jupiter Corporation has flouted the terms of the Commission's order of April 3, 1968" (Pet. App. 28a, J.A. 450), and concluded that, in order for the

[3] Petitioner filed its petition to review the Commission's April 3 and May 24 Orders on July 23, 1968. Despite the express provision in §19(c) of the Natural Gas Act, 15 U.S.C. § 717r(c), that the commencement of review proceedings "shall not, unless specifically ordered by the court, operate as a stay of the Commission's order," petitioner, without even seeking a stay, simply refused to comply with the Commission's April 3 and May 24 Orders. It was only after the issuance of the December 13 Order that petitioner sought a stay, which was denied by the court of appeals on February 6, 1969.

integrity of that Order to be maintained, it would have to take action directed to Tennessee as well as petitioner. (Pet. App. 23a, J.A. 445). The Commission then, in formal ordering paragraphs, reaffirmed petitioner's preexisting obligation to pay Phillips-Kerr-McGee at the 18.5 cent per Mcf rate and ordered that in the future, in light of petitioner's intransigence, Tennessee was to pay 18.5 cents per Mcf directly to Phillips-Kerr-McGee on petitioner's account. (Pet. App. 29a-30a, J.A. 450-51). Petitioner's contentions as to the invalidity of the December 13 Order were rejected by the Commission's Order of January 22, 1969, denying rehearing. (Pet. App. 34a, J.A. 455).

The court of appeals affirmed all of the Commission's Orders. It found that the 18.5 cent per Mcf rate, about which petitioner was complaining, was valid and did not violate the rule of the *Mobile* case (*United Gas Pipeline Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956)), as contended by petitioner. The enforcement Order of December 13, 1968, the court held, was authorized by Section 16 of the Natural Gas Act, 15 U.S.C. § 717*o*—which empowers the Commission to issue such orders "as it may find necessary or appropriate to carry out the provisions" of the Act—in light of the long history of petitioner's refusal to comply with final and effective Commission Orders.

ARGUMENT

The Commission has been struggling since 1962, when it instituted its investigation of petitioner's rates (see J.A. 283), effectively to regulate petitioner under the Natural Gas Act. Since 1962 the Commission, time and time again, has considered and rejected petitioner's arguments that its "spread" is beyond Commission control and that petitioner cannot lawfully be

required to pay Phillips-Kerr-McGee at an 18.5 cent per Mcf rate. The court of appeals, in a very careful and detailed opinion, considered and rejected all of petitioner's claims and upheld the Commission. Further review by this Court is not warranted.

This case involves no important or novel legal principles. It raises no issues that are of substantial significance beyond the confines of this case. It presents a unique factual situation that is unlikely to be repeated. The court of appeals decision does not conflict with any decision of any other court of appeals and, contrary to petitioner's argument, the decision below presents no conflict with any prior decision of this Court.

Petitioner, in seeking the intervention of this Court, asserts (a) that the court of appeals erred in deciding whether the contract between petitioner and Phillips-Kerr-McGee called for payment by petitioner at less than the 18.5 cent per Mcf rate set by the Commission because, petitioner claims, this issue had not been decided by the Commission and (b) that the Commission's Order of December 13, 1968, violated Section 19(a) of the Natural Gas Act, 15 U.S.C. § 717r(a), and the filed rate doctrine, and constituted a deprivation of petitioner's property without due process of law. There is no merit in either contention.

1. Throughout this proceeding—both before the Commission and in the court of appeals—petitioner has argued, invoking *United Gas Pipeline Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956), that it may not be required to pay at the 18.5 cent per Mcf rate set by the Commission because, it claims, its contract provides for payment at a lesser rate. (*E.g.*, Pet. App. 52a-53a). Its argument has been that its con-

tractual "spread" of 2.4 cents per Mcf cannot be regulated by the Commission, in light of *Mobile,* because any reduction ordered by the Commission in the amount petitioner receives from Tennessee necessarily reduces, by the same amount, the price it is contractually obligated to pay Phillips-Kerr-McGee.

Contrary to petitioner's current assertion, the record is clear that this argument was considered and rejected by the Commission and, therefore, that there was no bar to the court's consideration of this issue. As the court of appeals noted (Pet. App. 53a), the Hearing Examiner in the proceeding leading to the Commission's 1966 rate Order, reviewed the underlying contracts and determined that the contracts, properly interpreted, did not support petitioner's claim. (J.A. 202-06).[4] As the court of appeals further noted (Pet. App. 56a-57a), petitioner thereafter conceded, in its settlement proposals, that reformation of its contract would be required in order for it to recover any amounts from Phillips-Kerr-McGee, in addition to the "spread" ordered by the Commission, as payment for the asserted nonjurisdictional services performed by petitioner. (J.A. 235-36, 242).

In its Order of April 3, the Commission, as petitioner points out (Pet., pp. 8-9), acknowledged that it would not resolve the contractual issue between the parties as to whether petitioner was entitled to any compensation for its asserted nonjurisdictional services. The record is clear, however, that this reference is only to petitioner's contract reformation claim and

[4] On the merits, the court upheld the Examiner's reading of the underlying contracts, which were included in the administrative record certified to the court of appeals and relevant portions of which were included by the parties in the Joint Appendix before the court of appeals. (See J.A. 12-26).

that the Commission rejected on the merits petitioner's argument that its contract prevented the regulation of its "spread." As the court of appeals stated:

> "[T]he Commission has conceded nothing but the possibility that Jupiter [petitioner] has an equitable claim, disputed by PKM [Phillips-Kerr-McGee], for the reformation of its contract to require payment by PKM for nonjurisdictional services now that their cost is no longer being absorbed in an excessive charge to Tennessee. The Commission has never conceded that Jupiter is entitled *under the contract as written* to recoup any reductions in the spread chargeable to Tennessee from PKM. Indeed, the Commission scarcely had reason or occasion to do so. Jupiter's contractual argument was rejected by the examiner in the rate proceedings, and its settlement proposals stated in boldfaced type that reformation of its contract was required to enable it to collect payment for condensate services. Jupiter paid the 18.5 cent rate for nearly a year before filing its suit, based on its present theory of the contract, in the Cook County Court. When Jupiter finally made its position on the contract somewhat more explicit in its petition for rehearing of the April 3 Order, the Commission rejected it in the opinion denying rehearing." (Pet. App. 56a-57a, emphasis in original).

Petitioner's claim that the Commission did not resolve the basic contractual issue is further belied by the December 13 Order, where the Commission stated:

> "[I]f Jupiter were entitled to reformation of its contract with Phillips-Kerr-McGee in order to establish some payment for the remaining minor nonjurisdictional services it performed for Phillips-Kerr-McGee, that reformation would have to be done in a court of equity, outside the scope of the contract on file with us as a rate schedule." (Pet. App. 22a, J.A. 444).

Again, the Commission's January 22 Order expressly rejected petitioner's contractual argument:

> "Jupiter's argument as to the Commission's power to control the 'spread' charged under its contract is the same argument which Jupiter has made, unsuccessfully, several times before. We need go no further than to point out, again, that the contract between Jupiter and Phillips-Kerr-McGee is on file with this Commission as the contractual support for Phillips-Kerr-McGee's rate schedule covering the sale of natural gas to Jupiter and is subject to our jurisdiction as such. Jupiter may not evade its obligation to pay the filed rate by offsetting other contract claims against such jurisdictional rates." (Pet. App. 36a, J.A. 457).

In short, contrary to petitioner's current assertion, the Commission explicitly held that it had reviewed the contract between the parties and again rejected petitioner's *Mobile* argument that the contract prevented regulation of petitioner's "spread." The only "contract dispute" (Pet., p. 8) that the Commission did not decide was whether contract reformation might give petitioner some claim for compensation for "minor nonjurisdictional services" (Pet. App. 22a, J.A. 444), an issue not presented in these proceedings and plainly left open by the court of appeals. (Pet. App. 63a).

Finally, it must be pointed out that the court of appeals did not decide the *Mobile* issue, *sua sponte*.[5]

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[5] FPC v. Colorado Interstate Gas Co., 348 U.S. 492 (1955), is of no help to petitioner. That case holds that the Commission may not be reversed on the basis of an objection that had not been urged before the Commission in an application for rehearing. The teaching of that case, if at all relevant here, would be to preclude petitioner from raising the *Mobile* issue in the court of appeals in seeking to reverse the Commission, and to permit the court to affirm the Commission without even reaching the issue. *Colorado Interstate* does not preclude affirmance of the Commission on any ground that has record support, which the Commission's and the court's contract interpretation clearly has.

This issue was specifically raised by petitioner, which now—after the court of appeals has rejected its argument—incredibly takes the position that the court should not have decided the very issue that petitioner invited it to decide. Having played with fire, however, petitioner cannot now complain that it has been burned.

2. (a) Petitioner's claim that the Commission's December 13 Order constituted a modification of its prior Orders, in violation of Section 19(a) of the Natural Gas Act, was properly rejected by the court of appeals (Pet. App. 58a-59a), and we will not burden this Court with any further argument on this point.

(b) Petitioner's claim that the December 13 Order violated the filed rate doctrine was apparently viewed by the court of appeals as so lacking in merit as not even to warrant discussion. The fact is that that Order does not change the parties' basic contractual rights and duties. The amount of petitioner's "spread" is not affected. The Order simply alters the method and manner of payment, not the rates themselves. In fact, not only was there no violation of the filed rate doctrine, but adoption of the Order was necessitated by the doctrine—to require compliance by petitioner with the Commission-approved filed rate applicable to the sale of natural gas to petitioner.

(c) Finally, there is absolutely no basis for petitioner's attempt to invoke the due process clause. The most that due process can require is that a person subject to regulation by an agency be given the opportunity to seek judicial protection against unlawful and arbitrary agency action. The Natural Gas Act afforded petitioner this opportunity, petitioner in fact

sought judicial relief from the Commission's action, and the court determined that petitioner was not entitled to any relief. The due process clause was plainly satisfied, and none of the cases cited by petitioner is to the contrary.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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FEB 9 1970
JOHN F. DAVIS, CLERK

No. 1045

In the Supreme Court of the United States

OCTOBER TERM, 1969

THE JUPITER CORPORATION, PETITIONER

v.

FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

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